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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 16

BANCO NACIONAL DE CUBA, PETITIONER

v.

PETER L. F. SABBATINO, AS RECEIVER AND F. SHELTON PARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE AND HELEN G. DOWNS, CO-PARTNERS DOING BUSINESS AS FARR, WHITLOCK & CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 131–150) is reported at 193 F. Supp. 375. The opinion of the Court of Appeals for the Second Circuit (R. 152–189) is reported at 307 F. 2d 845.

JURISDICTION

The judgment of the Court of Appeals (R. 190) was entered on July 6, 1962. The petition for a writ

of certiorari was granted on February 18, 1963 (R. 191; 372 U.S. 905).

QUESTION PRESENTED

The United States will discuss the following question:

Whether a court of the United States is free to examine the validity of the decree of a recognized foreign government affecting title to property within its territorial jurisdiction.

INTEREST OF THE UNITED STATES

When the petition for a writ of certiorari was filed, the Court invited the Solicitor General to express the views of the United States (371 U.S. 907). In response, the Solicitor General submitted a memorandum urging that the writ be granted and stating that he would present a full statement of the position of the Executive Branch and supporting argument upon the merits.

The interest of the Executive Branch flows primarily from the effect which the decision in this case will have upon the conduct of foreign relations. The crux of the case is the scope of the so-called act of state doctrine, under which American courts have heretofore refused to judge the validity of the domestic legislative or executive acts of foreign governments recognized by the Executive. A principal reason for the development of the act of state doctrine has been a concern that the opposite attitude "would tend to disturb that equilibrium in our foreign relations which the political departments of our national government had diligently endeavored to

establish *United States* v. *Pink*, 315 U.S. 203, 233.

More specifically, the present case concerns nationalizations of property by the government of Cuba directed toward assets beneficially owned by United States citizens. The Executive Branch has acted and will continue to act to protect the interests of all Americans who have been affected by those Cuban nationalizations. Initially, the nationalization law involved in this case was the subject of a note of protest from the Department of State to the Cuban Government, 43 Department of State Bull. 171 (1960). More recently, the Treasury Department issued Cuban Assets Control Regulations, freezing Cuban assets in this country and blocking transfers of property interests to Cuba or her nationals. See 28 Fed. Reg. No. 132, pp. 6974–6985 (July 9, 1963), 31 C.F.R., Part 515. In the future, there may be occasion for negotiations for settlement of the claims of all Americans who have suffered losses. The ability of the Executive to take such effective general action depends to a significant extent upon whether the act of state doctrine will be enforced.

In addition, the decision of the court of appeals here was shaped by its interpretation of letters written by members of the Executive Branch which allegedly suspended the act of state doctrine in this case and authorized judicial inquiry into the validity of Cuba's acts. The United States has an important interest in the proper construction of these letters which have been deemed relevant to the decision of the case.

STATEMENT

In this brief as *amicus* we present merely a summary of the commercial situation out of which this case arose. The case concerns the right to the proceeds from the sale of sugar originally owned in Cuba by a Cuban corporation, Compania Azucarera Vertientes Camaguey de Cuba (hereafter "C.A.V."). On August 6, 1960, the Prime Minister and the President of Cuba, pursuant to Cuban law No. 851 of July 6, 1960 (R. 97–101), executed a Resolution nationalizing the property within Cuba of twenty-six companies, doing business in Cuba, in which nationals of the United States have important interests (R. 101–107).[1] C.A.V., a majority of whose stockholders reside in the United States, was one of the nationalized companies. At the time the Cuban nationalization resolution took effect, certain sugar (the proceeds of which are involved in this case) was being loaded by C.A.V. upon a ship in a Cuban port for export (R. 132, 137). The district court found that there could be "no doubt" that the sugar was within Cuban territory when the nationalization resolution took effect, that the nationalization purported to vest title in the sugar in the Cuban government, and that this was its effect under Cuban law (R. 138).

The original purchaser of the sugar from C.A.V. was to have been Farr, Whitlock & Co., an American commodity broker (R. 81–83, 132, 154). Immediately after the nationalization resolution took effect, while

[1] Although C.A.V. was organized under Cuban law, over ninety percent of its stockholders were residents of the United States (R. 154).

the sugar was still in a Cuban port, Farr, Whitlock entered into contracts to buy the nationalized sugar from a wholly owned corporation of the Cuban government to which the latter had assigned rights in the sugar (R. 75, 156). The vessel containing the sugar thereupon left Cuba and the sugar was eventually delivered to Farr, Whitlock's customer in Morocco (R. 75, 156).

After Farr, Whitlock had contracted to buy the sugar, Cuba assigned bills of lading for the sugar to the petitioner in this case, Banco Nacional de Cuba, which is another agency of the Cuban Government (R. 156). Banco Nacional forwarded the bills of lading to a French bank, Societe Generale, to act as its agent in New York to deliver the bills of lading to Farr, Whitlock in return for payment for the sugar (R. 156).

After nationalization, C.A.V. continued to assert title to the nationalized sugar. On August 16, 1960, the respondent Sabbatino was appointed by a New York State Court pursuant to a New York State statute as receiver to hold the New York assets of C.A.V. for the benefit of its shareholders (R. 6, 127). Farr, Whitlock was served with a copy of the order appointing the receiver on August 23, 1960 (R. 157), and on August 26, 1960, Farr, Whitlock was advised by officers of C.A.V. that C.A.V. asserted ownership of the sugar covered by the bills of lading in the hands of Societe Generale (R. 157). On August 29, 1960, Farr, Whitlock received the bills of lading for the sugar from Societe Generale and immediately negotiated them to its customer in return for the purchase

price for the sugar of $175,250.69 (R. 157). Farr, Whitlock subsequently refused to remit the price of the sugar to Societe Generale, asserting that C.A.V. claimed a paramount interest in the funds. On October 24, 1960, Farr, Whitlock delivered the proceeds of the sugar less commissions to the respondent Sabbatino as receiver for C.A.V. (R. 158).

This action was begun in the United States District Court for the Southern District of New York on October 10, 1960. Plaintiff Banco Nacional, petitioner here, sought damages against Farr, Whitlock for conversion of the bills of lading and also sought an injunction against the receiver, Sabbatino, restraining him from exercising jurisdiction over the proceeds of the sugar (R. 5–10). On March 31, 1961, the district court (Dimock, J.) granted summary judgment for the defendants[3] and dismissed petitioner's complaint on the ground that, despite the act of nationalization by the Cuban government, "C.A.V. owned the sugar which was sold in the present case" and petitioner therefore could have no right to relief (R. 132–151). The court held that although it was not free to disregard the nationalization on the ground that it did not comply with Cuban law or on the ground that the nationalization violated the public policy of New York or the United States (R. 138–139), it was free to examine the nationalization "under international law and refuse recognition to

[3] After the court of appeals' decision affirming the district court's judgment, the receivership was terminated. See *Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba*, 39 Misc. 2d 63. The suit against the receiver is therefore now moot.

the act if it is in violation of international law" (R. 139).[3] The court acknowledged the existence of a doctrine under which "courts of this country will not examine the validity of an act of a foreign state insofar as it purports to be effective within the territory of the acting state" (R. 140), but believed that the theoretical basis for this act of state doctrine "vanishes" "when the sovereign's acts impinge on international law" (R. 141). The court further recognized that "judicial refusal to inquire into the validity of an act of a foreign state has also been due to a desire not to embarrass the Executive in its conduct of foreign relations" but held that, in light of the Executive's previous public protest of these

[3] In invoking this exception, the district court relied, in large part upon opinions of commentators and textwriters. Some British and American writers in the field of international law have advocated recently that the act of state doctrine should not apply to governmental acts in violation of international law. See, *e.g.*, 1 Oppenheim, *International Law*, 267-270 (8th ed., Lauterpacht, 1955); Wortley, *Expropriation in International Law*, 33 Grotius Society Transactions 25 (1947); Morgenstern, *Foreign Acts Contrary to International Law*, 4 Int'l L. Q. 326 (1951); Mann, *International Delinquencies Before Municipal Courts*, 70 Law Q. Rev. 181 (1954); Hyde, *The Act of State Doctrine And The Rule of Law*, 53 Am. J. Int'l L. 635 (1959); Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826 (1959); Association of the Bar of the City of New York, Committee On International Law, *Report, A Reconsideration of the Act of State Doctrine in United States Courts* (1959); Domke, *Foreign Nationalizations*, 55 Am. J. Int'l L. 585 (1961); Coerper, *The Act of State Doctrine in the Light of the Sabbatino Case*, 56 Am. J. Int'l L. 143 (1962); Cohn, *Ex Injuria Jus Non Oritur*, 3 Santa Clara Lawyer, 23, 29 (1962); Note, *Castro Government in American Courts*, 75 Harv. L. Rev. 1607 (1962); Stevenson, *The Sabbatino Case—Three Steps Forward and Two Steps Back*, 57 Am. J. Int'l L. 97 (1963).

Cuban nationalizations as violating international law, "[it] can scarcely be believed therefore that judicial examination of the decree in the light of international law would embarrass the Executive" (R. 141). Judge Dimock then held that the nationalization violated international law (1) because it was not reasonably related to a Cuban public purpose, but was in retaliation against the United States government (R. 147), (2) because it was discriminatory against United States nationals (R. 147–148) and (3) because the Cuban government did not provide adequate compensation for the taking (R. 148–150).

On July 6, 1962, the Court of Appeals for the Second Circuit affirmed the district court's dismissal of the complaint (R. 190). The court of appeals did not adopt Judge Dimock's broad view that the so-called act of state doctrine doctrine does not preclude judicial inquiry into the validity of acts of foreign governments under international law. Rather, the court relied upon an exception to the act of state doctrine which had been created by its decisions in *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 251, certiorari denied, 332 U.S. 772, and *Bernstein* v. *N.V. Nederlandsche-Amerikaanshe Stoomvaart-Maatschappij*, 210 F. 2d 375, namely, that "when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen * * *" (R. 169). On the basis of letters written by the Legal Adviser to the State Department and by the Under Secretary of State for Economic Affairs after the district

court's decision, the court then held that the Executive Branch had in fact indicated in this case that it had no objection to judicial examination of the validity of the Cuban expropriation, (R. 169–170). Finally, the court of appeals held, as did Judge Dimock, that the Cuban nationalization of the sugar had violated principles of public international law. Therefore, C.A.V. retained title to the sugar and Banco Nacional had no cause of action against Farr, Whitlock or the receiver for conversion of the sugar's proceeds.

INTRODUCTION AND SUMMARY OF ARGUMENT

The act of state doctrine has traditionally been thought to require a court of the United States to treat as valid the acts of a recognized foreign government affecting title to property within that government's territorial jurisdiction.* The doctrine has deep historical roots and substantial justification both in theory and practical policy. The district court, however, has held that henceforth this doctrine should not apply when a foreign government acts in violation of principles of international law, at least in circumstances where the Executive Branch of the United States Government has publicly contended that a violation of international law has in fact occurred. Thus the court, after ruling that Cuba's

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* Whether a different rule should prevail in the case of an unrecognized foreign government is a question which is not presented here and which we put aside. See *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679; *The Maret*, 145 F. 2d 431 (C.A. 3); *Latvian State Cargo & Passenger S.S. Line* v. *McGrath*, 188 F. 2d 1000 (C.A.D.C.); *Williams* v. *Bruffy*, 96 U.S. 176.

nationalization resolution violated principles of public international law, held that, for the purposes of the lawsuit before it, nationalization did not pass an interest in the sugar involved to the government of Cuba, and granted summary judgment against the agency of the Cuban government in this suit.

We recognize that this decision of the district court that American courts should be free, despite the traditional act of state doctrine, to determine litigation according to principles of public international law, has some appeal as a potential step toward the development of recognized international rules of conduct. We nonetheless believe that the balance of considerations strongly favors the retention of the traditional doctrine. The "international law" exception to the act of state doctrine created by the district court has been summarily rejected at least twice in the past by this Court in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 304, and *Shapleigh* v. *Mier*, 299 U.S. 468, 471, and should not now be established.

The court of appeals in this case reached the validity of Cuba's acts on different reasoning than did the district court. Relying upon its decisions in *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 251, and *Bernstein* v. *N.V. Nederlandsche etc.*, 210 F. 2d 375, as creating an exception to the act of state doctrine when the Executive Branch announces that it does not oppose judicial consideration of the validity of the foreign state's act, and further relying upon letters written by members of the Executive Branch to counsel for *amici* below (after the district court decision (R. 170)) as satisfying the

Bernstein exception in this case, the court below concluded that it was therefore free to disregard the act of state principle here. Assuming that judicial consideration of the validity of a foreign act of state should not be foreclosed in the unusual case where the Executive formally expresses its judgment that the reasons for the doctrine do not call for recognition of the foreign act, the plain fact, we submit, is that there has been no such expression in this case.

Nor should this Court hold, for the first time, that executive silence regarding the act of state doctrine is equivalent to executive approval of judicial inquiry into the foreign act. While the act of state doctrine has long been established, an executive statement satisfying the *Bernstein* exception to the doctrine has, so far as we can determine, been issued only once—in the *Bernstein* case itself. To place the burden on the Executive to invoke the act of state doctrine would, therefore, turn history, as well as the purposes of the doctrine, upside down.

Finally, we wish to make it clear that, even when there may be a *Bernstein* statement, such a statement would not, of course, control or in any way seek to control the court's decision regarding the ultimate validity of the foreign act. Should the Executive state in particular circumstances that there is no obstacle to judicial consideration, the courts obviously remain entirely free to decide whether or not to recognize the foreign act as effective, and are not bound by the Executive's statement to find it ineffective.

690-991—63——3

ARGUMENT

I

A COURT OF THE UNITED STATES WILL NOT ADJUDICATE THE VALIDITY OF THE DOMESTIC ACTS OF A RECOGNIZED FOREIGN GOVERNMENT

A. THE ACT OF STATE DOCTRINE IS FIRMLY ESTABLISHED IN PRECEDENT

In *Underhill* v. *Hernandez*, 168 U.S. 250, 252, Mr. Chief Justice Fuller, speaking for the whole Court, articulated the act of state doctrine which is at the crux of this case:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The doctrine should have been applied by the lower courts in this case. Here, the recognized government of Cuba nationalized sugar which was within Cuba's territorial jurisdiction. The nationalization was in no sense extraterritorial but took effect wholly within Cuba. It was complete before the sugar left Cuba or the bills of lading passed to Farr, Whitlock. The lower courts were therefore foreclosed from questioning petitioner's title to the sugar by "sit[ting] in judgment" upon the nationalization.[8]

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[8] As to the rule regarding extraterritorial acts of state, see *Sokoloff* v. *National City Bank*, 239 N.Y. 158; *Vladikavkazsky Ry.* v. *New York Trust Co.*, 263 N.Y. 369; *Bollack* v. *Societe*

The act of state rule had origins well before the *Underhill* decision. It seems, for example, to have been recognized by the English Court of Chancery at least as early as 1674 in *Blad* v. *Bamfield*, 3 Swan. 604, 36 Eng. Rep. 992. In that case, Blad, a Dane, had been granted exclusive trading rights in the Danish territory of Iceland by the King of Denmark. Englishmen fished in Icelandic waters in derogation of Blad's Danish rights, and Blad had the Danish Government confiscate their property in Iceland. Blad subsequently came to England, and the English fishermen whose property had been confiscated brought actions of trespass and trover against him there. Blad, however, sought and obtained an injunction against these legal actions for much the same reasons which have continued to lead English and American courts to refuse to inquire into the validity of foreign acts affecting property within the jurisdiction of the acting nation, even when the property is owned by English or American nationals, (36 Eng. Rep. at 993):

> • • • [T]he Plaintiff [Blad] hath proved letters patent from the King of *Denmark* for the sole trade of *Iceland;* a seizure by virtue of that patent; a sentence upon that seizure; a confirmation of that sentence by the Chancellor of *Denmark;* an execution of that sentence after confirmation; and a payment of two thirds to the King of *Denmark* after that execution. Now, after all this, to send it to a trial

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Generale Pour Favoriser, Etc., 263 App. Div. 601; Restatement, *Foreign Relations Law of the United States*, § 46 (Proposed Official Draft, 1962).

at law, where either the Court must pretend to judge of the validity of the king's letters patent in *Denmark*, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the *English* have a right to trade in *Iceland*, is monstrous and absurd.

Early recognition of the existence of the act of state doctrine in this country can be found in *Ware* v. *Hylton*, 3 Dall. 199, 230, decided by the Court in 1796. Later in 1822, in *The Santissima Trinidad*, 7 Wheat. 283, 336, the Court, speaking through Mr. Justice Story, held that a court of this country would not "exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy." In a case arising out of the Civil War, *Williams* v. *Bruffy*, 96 U.S. 176, which held invalid a Confederate law confiscating property, this Court similarly said that if the law had been of a recognized independent sovereign its validity would not be examined by the courts, but held that the Confederacy had failed to attain that status.*

* A significant English decision of this period was that of the House of Lords in *Duke of Brunswick* v. *King of Hanover*, (1848) 2 H.L.C. 1, 17, where the House refused to examine the validity of an executive act of King William IV, confirmed by the German Diet, which placed the Duke of Brunswick under guardianship. The Lord Chancellor there stated, "whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his sovereign authority abroad." The other opinions in the case contained like expressions.

For additional early cases apparently recognizing that the

The act of state doctrine, therefore, had substantial roots when it was elaborated by the court in 1895 in *Underhill* v. *Hernandez*. In *Underhill*, the plaintiff was an American citizen operating a business in Venezuela. He alleged that he was falsely imprisoned there and assaulted by officers of the defendant Hernandez, the leader of certain revolutionary forces in Venezuela. Hernandez' forces were ultimately successful in establishing a Venezuelan government which was recognized by the United States. An action for false imprisonment and assault was brought by plaintiff against Hernandez in a federal court in New York after recognition of Hernandez' government. Judgment for the defendant was affirmed by the circuit court of appeals, on the ground that (65 Fed. 577, 579):

> Considerations of comity, and of the highest expediency, require that the conduct of states, whether in transactions with other states or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. The citizens of a state have an adequate redress for any grievances at its hands by an appeal to the courts or the other departments of their own

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acts of sovereigns done within their own territory will not be judged by the court of another country, see, *L'Invincible*, 1 Wheat, 238, 252–253, 260–261, and *Hatch* v. *Baez*, 7 Hun. 596. See also the argument of counsel in *Waters* v. *Collot*, 2 Dall. 247, 248 (Pa.), and the Attorney General's opinion in regard to the case, 1 Ops. A.G. 45. *The Exchange*, 7 Cranch 116, 135, is also often cited as a case recognizing the act of state doctrine. While the opinion of the Court, by Chief Justice Marshall, principally dealt with a foreign soverign's personal immunity from suit in our courts, the Chief Justice's opinion also recognized that the acts of the sovereign done within its own territory were immune from scrutiny.

> government. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs, even by a resort, if necessary, to the arbitrament of war. It would be not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states.

Although the decision could perhaps have been put upon the ground of the personal immunity of a governmental official from suit, the circuit court emphasized that the basis for decision was rather the immunity of the sovereign's act, 65 Fed. at 580. This Court affirmed the decisions below, holding that, "the Circuit Court of Appeals was justfied in concluding 'that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.'" (168 U.S. at 254.)

Eleven years after *Underhill*, the Court relied upon that case in a case involving an American company doing business abroad under foreign law. In *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, action had been taken by the Government of Costa Rica, in Costa Rica, against an American corporation. The Court, speaking through Mr. Justice Holmes, and citing *Underhill*, held that "a seizure by a state is not a thing that can be complained of elsewhere in the courts." 213 U.S. at 357–358.[1]

[1] Although the applications of the doctrines are of course distinct, the act of state doctrine bear similarity to the rule that a foreign sovereign enjoys immunity from suit in American

Two very important act of state cases arising from the Mexican Revolution were decided by the Court in 1918. *Oetjen* v. *Central Leather Co.*, 246 U.S. 297; *Ricaud* v. *American Metal Co.*, 246 U.S. 304. Both of these cases, like the case at bar, were concerned with title to property derived from foreign governmental expropriation. In *Oetjen*, a revolutionary force which ultimately became the recognized *de jure* government of Mexico confiscated some hides

courts. See *National City Bank* v. *Republic of China*, 348 U.S. 356, 358–359. Some commentators have suggested that the act of state doctrine grew out of the sovereign immunity principle and that the early decisions often cited for the act of state rule, *i.e.*, those prior to the *American Banana* case, were decided on or can be explained on sovereign immunity grounds. See, *e.g.*, Comment, "*Act of State*" *Immunity*, 57 Yale L.J. 108, 112 (1947); Re, Foreign Confiscations in Anglo-American Law [N.Y. 1951] 21–22; Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 828–830 (1959). The two principles were, however, recognized quite early as being distinct. *Cf.*, *The Exchange*, 7 Cranch 116, 135. It is clear that the opinion in *Blad* v. *Bamfield*, *supra*, 3 Swan. 604, 36 Eng. Rep. 992, and the opinion in *Ware* v. *Hylton*, *supra*, 3 Dall. 199, were concerned solely with the immunity of a sovereign's *act* from judicial scrutiny, not with the immunity of the sovereign itself, for in neither case were the sovereign or its official party. The same is true of *Williams* v. *Bruffy*, *supra*, 96 U.S. 176. While in such cases as *L'Invincible*, *supra*, 1 Wheat. 238, 252–253; *The Santissima Trinidad*, *supra*, 7 Wheat. 283, 336; *Duke of Brunswick* v. *King of Hanover*, *supra*, [1848] 2 H.L.C. 1; *Hatch* v. *Baez*, 7 Hun. 596; and *Underhill* v. *Hernandez*, *supra*, 168 U.S. 250, officials of foreign sovereigns were parties, the opinions were not placed entirely on this narrow ground, but recognized the separate immunity of the sovereigns acts as well. See also the opinion of the Circuit Court of Appeals in *Underhill* v. *Hernandez*, 65 Fed. 577, 580, pointing out that the decision in the *Duke of Brunswick* case "was put, not upon the personal immunity of the sovereign from suit, but upon the principle that no court in England could sit in judgment upon the act of a sovereign • • •."

in Mexico belonging to a Mexican citizen. The hides were sold by the revolutionary force to a Texas corporation which in turn sold them to the defendant, an American company. The plaintiff, the assignee of the former Mexican owner, brought an action of replevin to recover the hides from the defendant, claiming that the confiscation was invalid as in violation of Regulations annexed to the Hague Convention of 1907. In an opinion which is dispositive of the present case, the Court held, however (246 U.S. at 303–304), that:

> Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court such action is not subject to reexamination and modification by the courts of this country.
>
> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

The Court explicitly held that it was not "necessary" to consider the validity of the expropriation "under rules of international law applicable to the situation, since the subject is not open to reexamination by this or any other American court." The former owner's remedy, or that of a purchaser from him, was said to be "in the courts of Mexico or through the diplomatic agencies of the political department of our Government." 246 U.S. at 304.

In the *Ricaud* case, lead bullion had been confiscated by the same revolutionary force as in *Oetjen*, but the former owner of the property in *Ricaud* was an American rather than a Mexican national. After the bullion came into the defendant's possession in this country, a purchaser from the former owner brought a bill in equity for its return, maintaining that the confiscation was invalid and could not confer title. Again, the Court concluded that "when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." 246 U.S. at 309. The Court emphasized that "The fact that the title to the property in controversy may have been in an American citizen * * * does not affect the rule of law that the act within its own boundaries of one sovereign State cannot become the subject of reexamination and modification in the courts of another." 246 U.S. at 310.

The principles established by the decisions of this Court in the *Underhill*, *Oetjen*, and *Ricaud* cases have

frequently been applied by American and English courts to numerous expropriations of property in this century. For example, the Soviet expropriations of 1918 and 1919 gave rise to act of state decisions by the Court of Appeal in England,[8] the New York courts,[9] and this Court.[10] This Court applied the doctrine to a Mexican expropriation in *Shapleigh* v. *Mier*, 299 U.S. 468, and other American decisions have invoked the act of state doctrine in refusing to examine the validity of other Mexican expropriations,[11] Spanish seizures of property at the time of the Spanish Civil War,[12] German confiscations by the Nazi Govern-

[8] *Luther* v. *Sagor*, [1921] 3 K.B. 532; *Princess Paley Olga* v. *Weiss*, [1929] 1 K.B. 718.

[9] See, *e.g.*, *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679; *Dougherty* v. *Equitable Life Assurance Soc.*, 266 N.Y. 71, 193 N.E. 897.

[10] *United States* v. *Belmont*, 301 U.S. 324; *United States* v. *Pink*, 315 U.S. 203. The Court in these two cases refused to examine the validity of the nationalizations by the Soviet Union and held that the title to property derived therefrom must be respected by American courts. *Belmont* and *Pink* were not strictly "act of state" cases, for they, unlike the present case, involved an extra-territorial attempt to expropriate property situated outside of Russia at the time of the expropriations. Nevertheless, because of the circumstances surrounding our government's recognition of the Soviet Government, the Court held that United States foreign policy favored recognition of the particular acts. Because of this, the Court proceeded to consider the cases as being no different than ones involving territorial expropriations, and reaffirmed the applicability of the act of state rule to such circumstances.

[11] *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 28 F. Supp. 279 (S.D.N.Y.).

[12] *Banco de Espana* v. *Federal Reserve Bank*, 114 F. 2d 438 (C.A. 2).

ment,[12] and recent Cuban expropriations,[14] as well as other types of sovereign acts.[15] Substantial authority in other countries also recognizes the act of state principle.[16]

[12] *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E. 2d 798; *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (C.A. 2), certiorari denied, 332 U.S. 772; *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, Etc.*, 173 F. 2d 71, 210 F. 2d 375 (C.A. 2).

[14] *Pons* v. *Republic of Cuba*, 294 F. 2d 925 (C.A.D.C.), certiorari denied, 368 U.S. 960.

[15] See *e.g.*, *Hewitt* v. *Speyer, et al.*, 250 Fed. 367 (C.A. 2) (alleged breach of contract by government of Ecuador); *Earn Line S.S. Co.* v. *Sutherland S.S. Co.*, 254 Fed. 126 (S.D.N.Y.), affirmed *sub nom. The Claveresk*, 264 Fed. 276 (C.A. 2) (requisition of a vessel by the British Government); *Union Shipping & Trading Co.* v. *United States*, 127 F. 2d 771 (C.A. 2) (order of a French port captain directing the movements of a vessel); *United States ex rel. Steinvorth* v. *Watkins*, 159 F. 2d 50 (C.A. 2) (revocation of citizenship); *United States ex rel. Von Heymann* v. *Watkins*, 159 F. 2d 650 (C.A. 2) (alleged unlawful arrest by foreign government officials).

[16] See, *e.g.*, *United States of Mexico* v. *Batsafsche Petroleum Maatschappij*, [1919–1942] Ann. Dig. Pub. Int'l L. Cases 16, 17 (Holland) ("The Court is not qualified to examine whether and how far decrees of the Executive of a foreign State are legally valid * * *"); *Schweizerische Levensversicherungs-Und Rentenanstalt* v. *Elkan*, [1953] Int'l L. Rep. 36 (Switzerland, Federal Tribunal); *Anglo-Iranian Oil Company* v. *Idemitsu Kosan Kabushiki Kaisha*, [1953] Int'l. L. Rep. 305 (High Court of Tokyo); *De Keller* v. *Maison De La Pensee Francaise*, [1954] Int'l L. Rep. 21 (France, Tribunal Civil de la Seine); *Anglo-Iranian Oil Company Ltd.* v. *S.U.P.O.R. Company*, [1955] Int'l L. Rep. 19 (Italy, Court of Venice); *Anglo-Iranian Oil Company Ltd.* v. *S.U.P.O.R. Company*, [1955] Int'l L. Rep. 23 (Italy, Civil Court of Rome); *Ilitch* v. *Banque Franco-Serbe*, [1956] Int'l L. Rep. 19 (France, Tribunal de Commerce de la Seine). See Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 Am. J. Int'l L. 305 (1960). Also, compare *Anglo-Iranian Oil Co., Ltd.* v. *Jaffrate* [1953] 1 W.L.R. 246, [1953] Int'l L. Rep. 316, with *In re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323.

This is not to suggest that civil law countries regard the act of state principle as an absolute bar. Generally, they reserve the right to refuse to give effect to acts repugnant to the policy of the forum.

We submit that this history shows that the act of state doctrine is a deeply rooted principle of American law. It has uniformly been applied in circumstances like those of the present case—where a foreign government has expropriated property within its territory but beneficially owned by United States nationals; where the expropriated property (or its proceeds) has found its way into the United States; and where the application of the doctrine would be to deny recovery of their assets to Americans alleging the expropriation to have been without adequate compensation. We therefore urge the Court to reverse the decisions below on the basis of these uniform precedents.

Nor should this case be distinguished from the traditional act of state cases merely because the act of state doctrine here would be invoked in aid of the plaintiff, whereas in the ordinary case it is invoked by the defendant, or because the plaintiff here is an agency of the Cuban government. In the ordinary case, the property, after nationalization, is sold or otherwise transferred by the acting state to a private party, and the property, its proceeds, or the private owner (or perhaps the foreign state as continuing owner), later comes within the jurisdiction of an American court and is sought to be subject to suit by the original owner. Should the foreign state itself be sued, the doctrine of sovereign immunity constitutes an absolute bar.[11] In the other cases, as has been shown, the act of state doctrine uniformly has prevented an American court from questioning the title

[11] See note 7, *supra*.

acquired by the acting state upon which the private defendant relies.

In this case the parties are reversed, largely because of the commercial conduct of the American commodities broker who purchased the nationalized sugar from the Cuban government. After nationalization, the broker, apparently recognizing the title of the Cuban government, freely contracted with an agency of the Cuban government to purchase the nationalized sugar from it. Had the broker complied with this contract, the Cuban government or its assignee would, as in the ordinary case, be the defendant, assuming that the case, by chance, came within American jurisdiction. Here, however, the broker sought to and did obtain possession of the sugar without paying for it, and subsequently refused to pay. The broker's conduct, the precise details of which are in dispute,[18] has been charged to be a conversion of the proceeds of the sugar. Whether or not a conversion has taken place would, of course, be a matter for the trial court should the district court's award of summary judgment for the defendants be reversed, as we urge. If there has been a conversion, however, we submit that this should not remove the act of state doctrine from the case merely because it results in reversing the position of the parties.

To put the point in other words, this is not truly a case in which the act of state doctrine is being used by Cuban interests as a weapon for obtaining the as-

[18] The allegations regarding this conduct made before the district court are summarized in the court of appeals' opinion (R. 157-158).

sistance of our courts in effectuating the nationalization. The sugar was in Cuban territory. Nationalization was complete, and legal title to both the sugar and bills of lading was fully vested in the Cuban government before they left Cuba. The case is the same in principle as if Cuba seized and nationalized an automobile in Cuba and later a Cuban official brought it to the United States. The judgment of a United States court in a contest over ownership should not be made to turn upon whether the former owner brought suit against the Cuban official or forcibly or surreptitiously recaptured the car and forced the Cuban to sue him. The act of state doctrine requires the courts to assume the regularity of an established legal title and to leave the way open for diplomatic action, if appropriate, towards the foreign government. So long as all the acts necessary to vest title and possession are complete, the reasons for the act of state doctrine require its full application regardless of which party is plaintiff and which party is defendant. The administration of the doctrine should not encourage the private use of force or deception against the acting foreign government or its assignee. Yet the doctrine would do just that if its application turned upon its being invoked by the defendant rather than the plaintiff—a rule which would make physical possession at the time of the lawsuit critical to the result. Finally, the fact that Cuba itself is the plaintiff is irrelevant. An act of state dealing with title to property is nonetheless involved, and no beneficial purpose would be served by permitting Cuba's assignee for value, but not Cuba, to maintain suit on the title.

B. NO EXCEPTION SHOULD NOW BE MADE TO THE ACT OF STATE DOCTRINE FOR ACTS ALLEGEDLY IN VIOLATION OF "INTERNATIONAL LAW"

The argument made by the district court that the act of state doctrine should be inapplicable in American courts when a foreign government violates principles of public international law was summarily rejected by this Court in *Oetjen* v. *Central Leather Co.*, *supra*, at 304, and *Shapleigh* v. *Mier*, 299 U.S. at 471. In the latter case the Court said, as to a Mexican expropriation, "The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law * * *. For wrongs of that order the remedy to be followed is along the channels of diplomacy."[19] We recognize that the argument that this Court should now declare American courts free to apply public international principles in act of state cases may be motivated by a desire to advance the development of recognized rules of conduct governing sovereign nations. We submit, however, that the balance of considerations strongly favors retention of the traditional act of state doctrine in such cases. The disadvantages

[19] In writings advocating that municipal courts should examine foreign acts of state according to principles of public international law, it is sometimes stated that no case precludes such an examination under international law. The *Oetjen* case is either ignored or explained away as not in fact involving a violation of international law. See, *e.g.*, Restatement, Foreign Relations Law of the United States (Proposed Official Draft, 1962) § 43, Reporter's Note 3; 1 Oppenheim, *International Law* (8th ed., Lauterpacht, 1955) 267–270; Mann, *International Delinquencies Before Municipal Courts*, 70 Law Q. Rev. 181, 199 (1954); Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 843–844 (1959).

of abandoning the act of state doctrine in "international law" cases would be serious and immediate and would far outweigh its speculative merits. We stress the following considerations:

1. American judicial decisions applying international law would have, at best, only occasional application to foreign acts of state. The foreign acts to which the traditional act of state doctrine applies are not extraterritorial acts, but are domestic official acts taken entirely within the territorial jurisdiction of the acting nation. Such acts are presumptively valid under the law of the acting nation. Therefore, in the vast majority of the situations to which a foreign act of state applies, it will have effect, even should American courts hold it to violate international law. At best, American application of international law to the foreign sovereign's act will be sporadic and haphazard, depending upon wholly fortuitous circumstances, such as the foreign property, or the assignee of the foreign government, coming into the United States. American abandonment of the act of state doctrine in international law cases would thus, in no sense, serve to institute an international rule of law. Nor could such decisions hope to achieve any general redress of the wrong committed by the foreign government as it affects American nationals; they could only give relief to parties who, by chance, are able to bring suit in an American court.

2. Decisions invalidating foreign acts of state would have disruptive effects upon international transactions. Unquestionably, decisions like those below,

while they will be unable to afford any general remedy against infractions of international law or to exert any comprehensive effect upon the foreign conduct involved, will, by threatening to cloud the title to nationalized property, serve to disrupt international commercial transactions. There is no reason to believe that such decisions would, on the other hand, exert economic pressure which might ultimately deter countries from undertaking to nationalize privately owned assets. Nationalizations are significantly, if not primarily, influenced by political rather than commercial considerations. To the extent that markets for nationalized goods may be affected by the potential inquiry of American courts into the validity of the nationalizations, we point out that the prospect of American executive and legislative action, such as the American embargo on Cuban goods and this country's "freeze" order,[20] have a more certain and comprehensive impact. Moreover, in the absence of American executive and legislative action, American courts should obviously not take it upon themselves to exert this kind of political pressure.

3. American judicial decisions in act of state cases would not be likely to advance the development of principles of international law. Decisions by American courts striking down foreign official acts of state which impair American property interests will probably not be viewed abroad as dispassionate applications of neutral international principles. More likely, they will frequently be seen in many other nations as reflecting merely parochial American views parti-

[20] The embargo was imposed in February 1962 (see 31 C.F.R. 515.201) and the "freeze" in July 1963 (*supra*, p. 3).

san to American national interests. At the same time, it is predictable that they will almost invariably prove seriously offensive to, and injure relations with, the acting foreign state. A foreign state is bound to resent deeply an adjudication that it has violated international law. Inevitably, American judicial adjudications of the validity under international law of the conduct of foreign states would inappropriately involve this Court in international political controversies. The claimed benefits of removing the act of state doctrine in international law cases are therefore relatively insubstantial.

4. The primary and most satisfactory way to deal with foreign acts of state which violate international law is the exercise of diplomacy. In the absence of an international tribunal with power to settle controversies arising from sovereign acts, it seems evident that the effective and important means for dealing with acts of sovereign states which violate international law is not through sporadic American judicial decisions but through the exercise of diplomatic power by the Executive, including direct negotiation, economic and political action alone or in combination with other nations, and, more recently, submission of the question to the United Nations. "For wrongs of that order the remedy to be followed is along the channels of diplomacy." [11] The important benefit of executive diplomatic action is that it is not restricted, as is judicial action, to cases which, by happenstance, come within the jurisdiction of American courts. It may generally aim to protect all American interests

[11] *Shapleigh* v. *Meir*, *supra*, 299 U.S. at 471.

affected by the foreign act, although the property affected may, as it will in most cases, remain abroad.

As the act of state cases in this Court have repeatedly recognized, executive diplomatic action may be seriously impeded or embarrassed by American judicial decisions which undertake, in domestic lawsuits, to pass upon the validity of foreign acts. Judicial inquiry has this potential, whether or not it leads to a determination that the foreign state has acted unlawfully. It must be remembered that the proposed exception to the act of state doctrine for violations of international law would, of necessity, be applicable whenever such a violation is merely *alleged* by a party whose interests have been affected by the foreign act. Suppose diplomatic negotiations to have been undertaken between the United States and the acting foreign government on account of an act of state affecting American interests. A decision by an American court holding the foreign government's acts in such circumstances *not* to have violated international law might well seriously undercut such contemporaneous diplomatic negotiations; for the United States might well be taking the position, as a basis for requesting settlement of the dispute, that a violation of international law had in fact occurred. On the other hand, a decision by an American court during the conduct of negotiations that the foreign act *did* violate international law would amount to a charge of serious wrongdoing against the foreign state, and would undoubtedly embarrass and might even destroy con-

temporaneous negotiations in which the United States might be persuading the foreign state to make substantial or even full reparations to all United States nationals on the understanding that it would not be put in a position of acknowledging a violation of international law. The short of it is that it is essential, from the standpoint of conducting foreign relations, that the position to be taken by the United States regarding the legality of the acts of a foreign government within its jurisdiction should be determined by the Executive, not by individual state and federal judges. Finally, American judicial decisions charging a foreign state with a violation of international law, even if they have no effect upon negotiations involving the specific violation charged, may adversely affect other diplomatic negotiations with the acting state or with third states relating to entirely discrete matters.

The efforts of the Executive Branch to achieve general compensation for claims of all United States nationals affected by foreign nationalizations similar to the one in the case at bar have in the past met with success.[21] With regard to claims arising in eastern Europe following World War II, settlement agreements have already been reached with Yugoslavia,[22]

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[21] See generally Staff Memorandum, Committee on Foreign Relations, on *Claims Programs Administered by Foreign Claims Settlement Commission*, 88th Cong., 1st Sess. (Comm. Print, March 1963). Some of the figures contained therein have been brought up to date by later information furnished by the Department of State.

[22] Settlement of Pecuniary Claims against Yugoslavia, 62 Stat. 2658; TIAS 1803 (1948).

Rumania,[24] Bulgaria,[25] and Poland.[26] Negotiations with Czechoslovakia are in progress and a second agreement is being negotiated with Yugoslavia dealing with claims arising from actions following the date of the first agreement. The settlements agreed upon in these diplomatic negotiations have been approximately 90 percent of the value of the claim in the case of Yugoslavia, 35 percent for Rumania, and approximately 65 percent for Bulgaria. The settlement ratio has not yet been established for Poland.

So far as nationalizations in Latin America are concerned, the record is equally impressive. Approximately 90 percent of the amount of the claims arising from American losses of property in Panama in 1931 were paid as the result of an agreement between the United States and Panama.[27] With respect to claims arising out of the Mexican agrarian reform and other state actions between 1868 to 1940, 99 percent of the principal amount has been received by the claimants or their successors in interest as the result of a series of claims agreements.[28] When the domestic oil industry was nationalized by Mexico in 1938, that na-

[24] Settlement of Claims of United States Nationals and Other Financial Matters, 11 U.S.T. 317; TIAS 4451 (1960).

[25] Claims Agreement between United States and Bulgaria, — U.S.T. —; TIAS 5387, Sofia, July 2, 1963.

[26] Settlement of Claims of United States Nationals, 11 U.S.T. 1953; TIAS 4545 (1960).

[27] Claims Convention, 1 U.S.T. 685; TIAS 2129 (1950).

[28] Convention between United States and Mexico, Sept. 8, 1923, 43 Stat. 1730; TS 678 (1923); Convention between United States and Mexico, Sept. 10, 1923, 43 Stat. 1722; TS 676 (1923); Claims Convention, 56 Stat. 1347; TS 980 (1941). See also Report to the Secretary of State, American-Mexican Claims Commission, 1948, Dept. State Publ. 2859 (1948).

tionalization, like the Cuban nationalization in the present case, was protested by the United States Department of State, in a celebrated note from Secretary of State Hull.[29] Shortly thereafter, some of the oil from the nationalized property came under the jurisdiction of a United States court, as the proceeds of the sugar did in the case at bar. Plaintiff, the former owner, sought to recover the oil, on the ground that the nationalization had been contrary to Mexican and international law. The district court, however, relying on the act of state doctrine, refused to go behind assertion of title by the defendant, who had purchased the oil from the Mexican Government's oil concern. *Eastern States Petroleum Company* v. *Asiatic Petroleum Corp.*, 28 F. Supp. 279 (S.D.N.Y. 1939). After this act of state decision, and within five years of the nationalization, Mexico and the United States agreed on an amicable settlement of the claims, based on the findings of appraisers designated by the two countries.[30]

5. The reasons for the act of state doctrine are persuasively present even when the Executive, as in this case, has publicly taken the position that the foreign state has violated international law. While the Executive had publicly taken the position, prior to this litigation, that the Cuban decrees in question offend international law, the district court was wrong to conclude from this that there were no longer any reasons

[29] Note of Secretary of State Hull, July 21, 1938, 3 Hackworth, *Digest of International Law*, 655, 656.

[30] Exchange of Notes of Expropriation of Petroleum Property, 55 Stat. 1554; EAS 234 (1941); Agreement Relating to Payment for Expropriated Petroleum Properties, 58 Stat. 1408, EAS 419 (1943).

of policy calling for judicial restraint. Although the Executive Branch has objected to Cuba's action, that does not in the least remove the possibility that diplomatic action will be taken in response to the Cuban nationalizations. Indeed, our formal objection to Cuba's action was merely the Executive's initial participation in efforts to protect American interests in the nationalization dispute. Only recently, the Treasury Department has issued Cuban Assets Control Regulations freezing Cuban assets in this country and blocking transfers of property interests to Cuba or to her nationals.[11] Effective negotiations with Cuba to achieve some compensation for all American property which has been nationalized may well prove possible in the course of time. There can be no question that the potential power of the Executive Branch to act to protect all American interests *vis-a-vis* Cuba will be seriously hampered should American courts, contrary to the position which may be taken in future negotiations by the Executive, refuse to recognize any

[11] 28 Fed. Reg. No. 132, pp. 6974–6985 (July 9, 1963); 31 C.F.R., Part 515. In the event of a judgment in favor of petitioner, Banco Nacional, in this case, these Regulations would prohibit the execution or other enforcement of such a judgment without a license by the Office of Foreign Assets Control of the Treasury Department. It would not be in accordance with present Treasury policy to license any transfer which would have the effect of unblocking the sugar's proceeds should petitioner ultimately prevail here. However, in the view of the Treasury, the Regulations impose no barrier to the continuation of the litigation in this case, nor the entry of a judgment for petitioner. See the exchange of correspondence between the Solicitor General and Stanley L. Summerfield, Acting Director of the Office of Foreign Assets Control, reproduced in the Appendix to this brief.

Cuban title whatsoever to nationalized assets. Nor can the possibility be excluded that the present Cuban government may, in the future, be succeeded by a government more friendly to the United States. The power of such a successor government to deal with previously nationalized assets certainly ought not to be subject to American judicial decisions refusing to recognize that the nationalizations have affected interests in property in Cuba.

In sum, despite the Executive's publicly expressed attitude toward the Cuban nationalizations and the finding of the courts below that a violation of international law has occurred, all the reasons for the act of state doctrine forcibly apply to exclude judicial consideration of the validity of Cuba's acts as a basis for decision in the courts below. The Court should therefore adhere to the doctrine in the present case.

II

CONTRARY TO THE DECISION OF THE COURT OF APPEALS, THE EXECUTIVE BRANCH HAS NOT ANNOUNCED IN THIS CASE THAT IT DOES NOT OPPOSE ADJUDICATION OF THE VALIDITY OF THE CUBAN NATIONALIZATION

A. THE "BERNSTEIN" EXCEPTION

The decision of the court of appeals here turned upon its finding that this case comes within an exception to the act of state doctrine created by decisions of the Court of Appeals for the Second Circuit in *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, and *Bernstein* v. *N.V. Nederlandsche Etc.*, 210 F. 2d 375. Although we believe it perfectly plain that the exception is not applicable in this case since the

executive statement which it requires has not been made, it will be relevant first to describe the *Bernstein* exception.

The *Bernstein* cases involved the alleged confiscation of the property of a single plaintiff, a Jewish German national, by the Nazi German government between 1937 and 1939. Plaintiff alleged that he was compelled by officials of the government, acting through threats of bodily harm, indefinite imprisonment and death for plaintiff and his family, to assign his property to the German government. Beginning in 1946 the plaintiff sought to attach and recover some of the proceeds of his former property in a suit brought in a state court in New York and removed to the federal district court. In the first *Bernstein* case, *Bernstein* v. *Van Heyghen Freres Societe Anonyme, supra,* 163 F. 2d 246, the court, in an opinion by Judge Learned Hand, held that the act of state doctrine prevented it from inquiring into the validity of the confiscation of the plaintiff's property by the Nazi government; therefore the Court affirmed the district court's dismissal of the plaintiff's complaint. However, in the course of his opinion, Judge Hand said that it was a relevant question "whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned, does not apply."[22] After full considera-

[22] 163 F. 2d at 249. The court's opinion said: "[T]he plaintiff's difficulty lies * * * because of that other doctrine which we have mentioned: i.e., that no court will exercise its jurisdiction

tion, the court concluded that the Executive Branch had not in fact acted to relieve the courts of the restraint imposed by the normal act of state doctrine.

In the second *Bernstein* case, the same plaintiff brought another action against different defendants based upon the alleged Nazi confiscation. *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, Etc.*, 173 F. 2d 71. The Second Circuit reaffirmed its holding in the first *Bernstein* case that the act of state doctrine prevented judicial examination of official acts of the Nazi Government. The court, however, remanded the case for the purpose of allowing the plaintiff to allege, if he could, that the seizure of his property in Germany was not an official governmental action but was the act of persons performing in a private capacity, so that the act of state doctrine would not be a bar to his recovery.

Following this decision, and in accord with the language of the first *Bernstein* case, counsel for the plaintiff wrote to the Department of State to ascertain the views of the Executive Branch. He received a reply (with copies for the court and for counsel representing all the parties) from the Acting Legal Adviser of the Department of State, stating that:

> "The policy of the Executive, with respect to claims asserted in the United States for the

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to adjudicate the validity of the official acts of another state. This the plaintiff acknowledges as generally true, but he says that it presupposes that the state of the forum has not acted to relieve its courts of restraint upon the exercise of their jurisdiction; and that our own government has already so acted. This is the remaining and the critical issue in the case; and we have to examine what those actions have been." *Id.* at 249–250.

> restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials. [20 Dept. State Bull. 592, 593, (May 8, 1949.)]

Thereupon, the court of appeals amended its prior decree and held that the letter from the Acting Legal Adviser removed the act of state restraint which the courts had been under, and ordered the district court to try the case on the merits, *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, Etc.*, 210 F. 2d 375.

The *Bernstein* exception to the act of state doctrine has never been reviewed by this Court, but it appears not inconsistent with the Court's act of state decisions to say that the Executive may, in special circumstances which it finds compelling, certify that the reasons for the act of state doctrine do not apply to foreclose judicial consideration.[33] In all events, a "*Bernstein* letter" invoking the exception and waiving the act of state doctrine seems to have been issued only once, in the *Bernstein* case itself,[34] so in practice the exception is an exceedingly narrow one. The cir-

[33] The *Bernstein* exception has met with general approval. See, *e.g.*, Restatement, Foreign Relations Law of the United States, § 44 (Proposed Official Draft, 1962); Katzenbach, *Conflicts on an Unruly Horse*, 65 Yale L.J. 1087, 1152–1153 (1956); Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 Am. J. Int'l L. 141, 151–152 (1960). But cf., Falk, *A Theory of the Participation of Domestic Courts in the International Legal Order*, 16 Rutgers L. Rev. 1 (1961).

[34] We are so advised by the Legal Adviser to the Department of State, after a search of the files of the Department.

cumstances leading to the State Department's letter in the *Bernstein* case were of course most unusual. The governmental acts there were part of a monstrous program of crimes against humanity; the acts had been condemned by an international tribunal after a cataclysmic world war which was caused, at least in part, by acts such as those involved in the litigation, and the German State no longer existed at the time of State Department's letter. Moreover, the principle of payment of reparations by the successor German government had already been imposed, at the time of the "*Bernstein* letter," upon the successor government, so that there was no chance that a suspension of the act of state doctrine would affect the negotiation of a reparations settlement. See 163 F. 2d. at 250–251.

We wish to point out also that a "*Bernstein* letter," should one be issued in special circumstances where it might be appropriate, plainly does not seek to decide the case in question, but merely removes the act of state bar to judicial consideration of the foreign act. The conflict-of-laws rules of the forum might nevertheless, in a particular case, prevent judicial examination of a particular alleged ground of invalidity. Or the court might find the act of state entirely valid under principles of international law or "public policy" and give full effect to it. Moreover, even if an act of state should be held invalid after a "*Bernstein* letter," the applicable property law might still protect the title of a bona fide purchaser.

B. NO EXECUTIVE STATEMENTS INVOKED THE "BERNSTEIN" EXCEPTION IN THIS CASE

Whatever the proper limits of the *Bernstein* exception to the act-of-state doctrine, we think it plain that the court of appeals in this case erred in holding that the State Department here had issued a "*Bernstein* letter." A full account of the correspondence relied upon by the court of appeals (which counsel arguing for the *Bernstein* exception apparently did not lay before that court) makes it plain that the court of appeals' holding was erroneous.

The letters relied upon by the court of appeals were part of a correspondence which took place between October 10, 1961, and November 21, 1961, after the district court decision below and after briefs had been filed in the court of appeals.[23] After the district court decision, counsel for the receiver addressed one letter to the Secretary of State and counsel for the *amici curiae* directed eleven letters to members of the Executive Branch, including the Solicitor General, the Secretary of State, the Under Secretary of State for Economic Affairs, the Legal Adviser of the Department of State, the Deputy Legal Adviser, the Special Assistant to the Legal Adviser, the Assistant Secretary of State for Inter-American Affairs, and the Administrator of the Agency for International Development. While the letters differed in detail, the purpose of all of them was to obtain agreement from the Executive Branch with the position of the respondents and the

[23] The correspondence is reproduced in Appendix B to the Memorandum for the United States submitted to this Court on the Petition for a Writ of Certiorari in this case, pp. 14–43.

amici curiae. The letters contrasted statements issued by the Department of State in the summer of 1960 condemning the Cuban nationalizations with certain statements by the State and Justice Departments in the course of a lawsuit involving the M.V. Bahia de Nipe in August and September 1961, *Rich* v. *Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va.), affirmed, 295 F. 2d 24 (C.A. 4). Ultimately, they sought from the Executive Branch, and particularly from the Department of State, a clear declaration that would serve to lift any restraint upon the judiciary's examination of acts of nationalization by the Government of Cuba.

The Department of State directly issued only one reply to these letters:[**] a letter from the Under Secretary of State for Economic Affairs, dated November 14, 1961, reading as follows:

> DEAR MR. LAYLIN: The Secretary has asked me to reply to your letter of October 24, 1961, to him concerning certain litigation in which your client, the Cuban-American Sugar Company, is interested.
>
> I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.
>
> Sincerely yours,
>
> (S) GEORGE W. BALL,
> *Under Secretary for Economic Affairs.*

Unquestionably, this letter from Secretary Ball represents nothing more than a refusal to comment upon the case, which was at that time pending on appeal from

[**] The Soliciter General's reply merely acknowledged receipt of the letter.

Judge Dimock's decision dismissing petitioner's complaint. It was obviously not a "*Bernstein* letter" formally removing the act-of-state bar from the court of appeals' consideration.

In addition, the court of appeals was presented with another letter, written by the Legal Adviser of the Department of State, upon which it apparently also relied. Since only part of that letter seems to have been presented to the court below (by means of Appendix V to the brief of the *amici curiae,* filed several months after the brief itself), we shall set forth the circumstances surrounding this letter and quote its full text.

In the weeks following October 10, 1961, John Laylin, counsel for the *amici curiae,* wrote letters to several members of the Executive Branch and sought appointments with them in order to present his arguments in person. He had made a tentative appointment with Abram Chayes, the Legal Adviser of the Department of State, but the latter was forced to cancel the appointment because of a trip abroad. Before he left, Mr. Chayes telephoned Mr. Laylin to cancel the appointment, discuss the case briefly, and to suggest that Mr. Laylin talk with his Special Assistant, Mr. Lowenfeld, and with the Deputy Legal Adviser, Mr. Meeker, both of whom were familiar with the case. Confirming this telephone call, Mr. Chayes wrote a letter to Mr. Laylin, which is the letter upon which the court of appeals relied:

> DEAR JOHN: I received your letter of October 10, 1961, as well as the copy of your letter of the same date to George Ball, which he has asked me to answer. As I mentioned on the

telephone this afternoon, I am about to leave on a two-week trip to Europe and Africa. Let me just confirm here briefly the thoughts I expressed to you over the telephone.

The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Herter. Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction.

I am sure that you will have a fruitful discussion with Mr. Meeker and Mr. Lowenfeld, both of whom are well informed on all of these cases.

With best regards,

Sincerely yours,

(S) Abe,

ABRAM CHAYES.

In light of its context, Mr. Chayes' personal letter, like Secretary Ball's, was obviously nothing more than a refusal to express an opinion whether the Cuban nationalizations should be given effect in American courts, either because of the act of state doctrine or for any other reason. It is clear that neither Mr. Chayes nor Secretary Ball in these letters made an official expression, as was made in *Bernstein* (210 F. 2d at 376), that "the policy of the Executive * * * is to relieve American courts from any restraint upon

the exercise of their jurisdiction to pass upon the validity of the acts" of Cuba.

There was, therefore, no *"Bernstein* letter" removing the traditional act of state doctrine from this case.

C. THE COURT SHOULD NOT NOW HOLD EXECUTIVE SILENCE TO BE EQUIVALENT TO A "BERNSTEIN LETTER"

An extension of the *Bernstein* exception has been suggested which, while theoretically preserving the act of state doctrine in "international law" cases, would create an exception to the doctrine where a violation of international law is alleged *unless* the Executive Branch issues a formal statement affirmatively indicating that adjudication of the validity of the foreign act would "prejudice the conduct of the foreign relations of the United States." (Association of the Bar of the City of New York, Committee on International Law, *Report, A Reconsideration of the Act of State Doctrine in United States Courts* (1959). The resolution is reproduced in Hyde, *The Act of State Doctrine and the Rule of Law,* 53 Am. J. Int'l L. 635 (1959).) Under this view, unless the Department of State indicates otherwise, "the absence of such prejudice [to foreign relations] shall be presumed."

This proposal seems to recognize, as we urge in this brief, that the act of state doctrine is an important aspect of the diplomatic settlement of international disputes. It further recognizes that judicial consideration of the validity of foreign acts of state should not take place when disapproved by the Executive Branch. The proposal, however, would reverse all past practice and make the act of state doctrine applicable only when affirmatively and specifically in-

voked by the Executive; otherwise, the doctrine would not apply, on the theory that Executive consent to adjudication "shall be presumed." In light of the fact that only one "*Bernstein* letter" has ever been issued by the Department of State,[37] in the wholly exceptional circumstances of the *Bernstein* case, this presumption of executive consent in all cases seems utterly unsupported in fact. Nor is there any reason to suppose that the act of state doctrine will, in the future, be justified only occasionally.

Such a rule would also put an embarrassing burden upon the Executive. In the conduct of international relations it may be of the utmost importance to preserve silence or at least to refrain from issuing official documents upon the legal status of the act of a foreign government. The proposed rule would compel the Executive either to issue a formal statement in advance of litigation whenever a foreign government had issued a decree that someone might claim affected the title to property within its jurisdiction in violation of international law, or else to keep track of court dockets all over the country lest a case that would embarrass the conduct of foreign relations go to judgment without the Executive's raising the bar. Even if this burden were eased by requiring notice to the Executive before the presumption of executive consent would be invoked, the Executive would still face the embarrassment of taking a position when silence would be wiser, or of announcing its position at a moment highly inopportune from the diplomatic standpoint in order to suit the convenience of private litigation.

[37] See *supra*, p. 37.

In addition, it is only realistic to bear in mind the domestic political consequences of the kind of pronouncement that the proposed rule would require. Barring the prosecution of suits relating to seizure of property under the decree of a foreign government would normally stir comment and criticism which could be met adequately only by complete disclosure—perhaps of reasons of state or of the progress of negotiations. Untimely disclosure, however, might often defeat the very policy that the act of state doctrine was invoked in order to promote. To compel a statement in every case could not fail in many instances to put a heavy-handed burden upon international relationships and upon the conduct of negotiations.

There is still a further objection to the Bar Association's proposal: it offers too much likelihood of embarrassment simply because of a miscalculation as to the likely ruling of the judicial forum upon a question of international law. The application of international law to many situations is fraught with uncertainty. The issue may come before judges of every rank and background, many of them subject to local feeling. It requires no great amount of imagination to foresee cases in which the Executive might conclude (i) that a judicial decision invalidating the act of a foreign state would embarrass the conduct of our foreign relations or impede the return of American property, (ii) that a public statement objecting to any judicial scrutiny would be untimely or itself unwise, and (iii) that a court would conclude that there was no violation of international law. Under such circumstances, the Executive might well remain silent only to find our international relations embarrassed

by an unexpected ruling that the decree of the foreign government did violate international law."

We submit, therefore, that the present *Bernstein* rule requiring an express executive waiver accurately reflects the general propriety of the act of state doctrine. The proposal to place the burden of invoking the doctrine upon executive action in every case could only be justified by the view that the general application of the act of state doctrine to international law cases should be abandoned. We urge, however, that the sound considerations of policy outlined in this brief strongly counsel its retention.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

NICHOLAS DEB. KATZENBACH,
Deputy Attorney General.

PAUL BENDER,
Assistant to the Solicitor General.

MORTON HOLLANDER,
JOHN C. ELDRIDGE,
Attorneys.

Andreas [redacted] F. LOWENFELD,
Assistant Legal Adviser for Economic Affairs, Department of State.

SEPTEMBER 1963.

"The Bar Association's proposal is also directly contrary to the *Bernstein* opinion itself, where Judge Hand said, in this regard, "the only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; *some positive evidence of such an intent being necessary.*" 163 F. 2d 246 at 251. [Emphasis added.]

APPENDIX

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C., 20530, August 14, 1963.

146-1-95-0

STANLEY SUMMERFIELD, ESQ.,
Director, Office of Foreign Assets Control,
Department of the Treasury,
Washington, D.C. 20220

Re: Banco Nacional de Cuba v. Peter L. F. Sabbatino, as Receiver, and F. Shelton Parr, William F. Prescott, Emmet Whitlock, Lawrence H. Dixon, H. Bartow Farr, Elizabeth C. Prescott, Fabio Freyre and Helen G. Downs, Co-partners doing business as *Farr, Whitlock & Co.—No. 16, October Term, 1963*

DEAR MR. SUMMERFIELD: Some question has been raised as to the possible bearing of the Cuban Assets Control Regulations, 31 C.F.R., Part 515, on the above-captioned case. I assume from my reading of subpart B that the various prohibitions upon transfers and transactions involving Cuban nationals will not prevent an adjudication of the claims for damages involved in the case and that there will be no barrier either to the continuation of the litigation or to entry of an appropriate judgment therein. I should appreciate a statement of your views in this matter.

Sincerely yours,

ARCHIBALD COX, *Solicitor General.*

TREASURY DEPARTMENT,
Washington 25, August 16, 1963.

Foreign Assets Control
In reply refer to: No. 46013

DEAR MR. COX: This is in reply to your letter of August 14, 1963, your reference 146–1–95–0.

This office sees no barrier to continuation of the litigation in the case of *Banco Nacional de Cuba* vs. *Sabbatino et al.*, nor to the entry of an appropriate judgment therein. As you are aware, if the judgment were in favor of the Banco Nacional de Cuba, the Regulations would prohibit any unlicensed execution or other enforcement or carrying out of such a judgment or decree or order. In such event, the Regulations would also prohibit any other unlicensed transaction involving the proceeds of the sugar presently in the custody of the receiver Sabbatino. It would not be in accord with our policy to license any transfer which would have the effect of unblocking the property.

Very truly yours,

STANLEY L. SOMMERFIELD, *Acting Director.*

ARCHIBALD COX, ESQ.
Solicitor General
Department of Justice
Washington 25, D.C.

U.S. GOVERNMENT PRINTING OFFICE: 1963